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No. 79-5932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

JOHN DOE and JANE ROE,
Appellants,

v.

STATE OF DELAWARE,
Appellee.

On Appeal From the Supreme Court of Delaware

BRIEF OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN AND THE GUARDIAN AD LITEM PROGRAM OF THE DISTRICT OF COLUMBIA *AMICI CURIAE*

DOUGLAS J. BESHAROV
ROBERT M. HOROWITZ
JEAN R. BOWER
HARVEY SCHWEITZER
Volunteer Attorneys Office
District of Columbia
Superior Court
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 727-9707

Attorneys For Amici Curiae

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
QUESTIONS PRESENTED BY *AMICI*	3
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	4
ARGUMENT	7
I. Under The Federal Rules Of Civil Procedure And The Due Process Clause, The Children Who Are The Subjects Of This Proceeding Should Be Given Party Status Before This Court And Provided With Legal Representation	7
A. The Federal Rules Of Civil Procedure Require That The Children Be Given Party Status Before This Court And Provided With Legal Representation	9
B. The Due Process Clause Of The Fourteenth Amendment Requires That The Children Should Be Given Party Status Before This Court And Provided With Legal Representation	16
1. Protection Of Family Relationships	16
2. Protection Of A State Created Right	21
II. If The Children Are Not Represented Before This Court And This Court Holds That The Delaware Statute Is Unconstitutional, The Children Have A Right To A Subsequent Hearing To Determine Whether Their Best Interests Require That The Court's Decision Be Given Non-retroactive Application	24

TABLE OF CONTENTS—Continued

Page

A. If This Court Holds That The Delaware Statute Is Unconstitutional, The Best Interests Of The Children Might Require That The Court's Decision Be Given Nonretroactive Application 24

B. If The Children Are Not Represented Before This Court, A Subsequent Evidentiary Hearing Will Be Necessary To Determine Whether The Children's Best Interests Require The Nonretroactive Application Of The Court's Decision 29

CONCLUSION 34

APPENDIX 1a

TABLE OF AUTHORITIES

Cases:

Page

Alsager v. *District Court of Polk County*, 406 F.Supp. 10 (S.D. Iowa 1975), *aff'd in part*, 545 F.2d 1137 (8th Cir. 1976) 18, 30

Alsager v. *District Court of Polk County*, 518 F.2d 1160 (8th Cir. 1975) 30

Alsager v. *District Court of Polk County*, 384 F.Supp. 643 (S.D. Iowa 1974) 24

Bellotti v. *Baird*, 442 U.S. 662 (1979) 27

Bennett v. *Jeffreys*, 40 N.Y.2d 543, 387 N.Y.S.2d 821, 356 N.E.2d 277 (1976) 17, 20, 25, 28, 30

Brown v. *Board of Education*, 349 U.S. 294 (1955) 27

Brown v. *Guy*, 476 F.Supp. 771 (D. Nev. 1979) 27, 34

Caban v. *Mohammed*, 441 U.S. 380 (1979) 20, 26

Coffey v. *Dept. of Social Services of Baltimore City*, 41 Md. App. 340, 397 A.2d 233 (1979) 28

Craig v. *Boren*, 429 U.S. 190 (1976) 22

Dixon v. *United States*, 197 F.Supp. 798 (W.D. S.C. 1961) 16

Duchesne v. *Sugarman*, 566 F.2d 817 (2d Cir. 1977) 34

Drummond v. *Fulton County Department of Family & Children's Services*, 547 F.2d 835 (5th Cir. 1977) 7, 17

Drummond v. *Fulton County Department of Family & Children's Services*, 563 F.2d 1200 (5th Cir.) (*en banc*), *cert. denied*, 437 U.S. 910 (1977) 11, 14, 20, 23

Eastern-Central Motor Carriers Assoc. v. *United States*, 321 U.S. 194 (1944) 15

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 21

Goldstein v. *Lavine*, 100 Misc.2d 126, 418 N.Y.S.2d 845 (Sup.Ct., N.Y.Co. 1979) 31

Hoy v. *Willis*, 165 N.J. Super. 265, 398 A.2d 109 (1978) 28, 32

Hurd v. *Illinois Bell Tel. Co.*, 234 F.2d 942 (7th Cir.), *cert. denied*, 352 U.S. 918 (1956) 15

TABLE OF AUTHORITIES—Continued

Page

In re D., 24 Ore. App. 601, 547 P.2d 175 (1976), *cert. denied*, 429 U.S. 907 (1976) 11
In re Gault, 387 U.S. 1 (1966) 11, 17
In re One Minor Child, 254 A.2d 443 (Del. 1969) 28
In re Orlando F., 40 N.Y.2d 103, 386 N.Y.S.2d 64 (1976) 18
In re Three Minor Children, 406 A.2d 14 (Del. 1979) 32
In the Matter of Adoption of J.S.R., 374 A.2d 860 (D.C. App. 1977) 28
In the Matter of Sanjivini, 47 N.Y.2d 374, 418 N.Y.S.2d 334, 391 N.E.2d 1316 (1979) 30
International Tank Terminal, LTD v. *M/V Acadia Forest*, 579 F.2d 964 (5th Cir. 1978) 15
International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO Local 283 v. *Scofield*, 382 U.S. 205 (1965) 15
Joint Anti-Fascist Comm. v. *McGrath*, 341 U.S. 123 (1951) 23
Kyees v. *County Department of Public Welfare of Tippicanoe Co.*, 600 F.2d 693 (7th Cir. 1979) 20, 34
Lemon v. *Kurtzman*, 411 U.S. 192 (1973) 26, 27, 33
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 14, 18
Matter of Fish, 569 P.2d 924 (Mont. 1977) 18
Matter of Suzanne Y., 92 Misc.2d 652, 401 N.Y.S. 2d 383 (Fam. Ct., N.Y.C. 1977) 32
Meachum v. *Fano*, 427 U.S. 226 (1976) 21, 22
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 10
Moore v. *City of East Cleveland*, 431 U.S. 494 (1977) 19
Norton v. *Shelby County*, 118 U.S. 425 (1886) 26
O'Bannon v. *Town Court Nursing Center*, 78-1318 (U.S. Sup. Ct. June 23, 1980) 21
Parham v. *J.R.*, 442 U.S. 584 (1979) 10, 18
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) .. 10
Planned Parenthood of Central Missouri v. *Danforth*, 428 U.S. 52 (1976) 17, 27

TABLE OF AUTHORITIES—Continued

	Page
Prince v. *Massachusetts*, 321 U.S. 158 (1944)	11, 27
Quilloin v. *Walcott*, 434 U.S. 246 (1977)	16, 29
Roe v. *Conn*, 417 F.Supp. 769 (M.D. Ala. 1976)	18
Rothstein v. *Lutheran Social Services of Wisconsin and Upper Michigan*, 405 U.S. 1051 (1972)	28, 31
Sanchez v. *Texas Dept. of Human Resources*, 581 S.W.2d 260 (Tex. 1979)	17
Sherrad v. *Owens*, 484 F.Supp. 728 (W.D. Mich. 1980)	20, 34
Sims v. *State Dept. of Public Welfare*, 438 F.Supp. 1179 (S.D. Tex. 1977), *rev'd on other grounds sub nom. Moore* v. *Sims*, 442 U.S. 415 (1979)	18
Smith v. *Organization of Foster Families For Equality and Reform*, 431 U.S. 816 (1977)	10, 13, 16, 18, 19, 20, 21, 22, 25, 27, 28, 34
Stanley v. *Illinois*, 405 U.S. 645 (1972)	28
Stapleton v. *Dauphin County Welfare Services*, 228 Pa. Super. 371, 324 A.2d 562 (1974)	18, 34
State ex rel. Juvenile Department of Multnomah County v. *Wade*, 19 Ore. App. 314, 527 P.2d 753, *reh'g denied*, 19 Ore. App. 835, 528 P.2d 1382 (1974), *appeal dismissed sub nom. Wade* v. *Oregon*, 423 U.S. 806 (1975)	11
Syrovatka v. *Erlich*, 608 F.2d 307 (8th Cir. 1979)	25
Tshovich v. *United Mine Workers of America*, 404 U.S. 528 (1972)	12
U.S. Postal Service v. *Brennan*, 579 F.2d 188 (2d Cir. 1978)	15
Wagstaff v. *Superior Court*, 535 P.2d 1220 (Ala. 1975)	18
Wisconsin v. *Yoder*, 406 U.S. 205 (1972)	19, 27
Wolf v. *McDonnell*, 418 U.S. 539 (1974)	21, 22

Constitution, Statutes and Rules:

Fourteenth Amendment	*passim*
DEL. CODE ANN., Fam. Ct. Rules, Rule 360 (1974)	8

TABLE OF AUTHORITIES—Continued

	Page
13 DEL. CODE ANN. § 772(a) (1978)	32
FED. R. CIV. P. 17(c)	10
FED. R. CIV. P. 19(a)(2)	10, 13
FED. R. CIV. P. 24(a)(2)	15
MD. CHANCERY CODE ANN., Art. 16, § 75 (Supp. 1978)	29
N.Y. FAM. CT. ACT § 249 (McKinney 1979)	8
42 U.S.C. § 1983 (1976)	34
42 U.S.C. § 5103(b)(2)(G) (1978)	8

Miscellaneous:

Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972)	12
Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565 (1976)	12
J. Goldstein, A. Freud, A. Solnit, BEFORE THE BEST INTERESTS OF THE CHILD (1979)	12, 29
J. Goldstein, A. Freud, A. Solnit, BEYOND THE BEST INTERESTS OF THE CHILD (1973)	19
IJA/ABA Juvenile Justice Standards Project, COUNSEL FOR PRIVATE PARTIES, § 1.1, 2.3 (1977)	12
Katz, *Model Act to Free Children For Permanent Placement*, § 14, 13 FAM. L. Q. 330 (1979)	12
Ketcham & Babcock, *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 RUT. L. REV. 530 (1976)	25
Lowry, *Children's Rights*, found in: ADVOCATING FOR CHILDREN IN THE COURTS 359 (1979)	32
Muench & Levy, *Psychological Parentage: A Natural Right*, 13 FAM. L. Q. 129 (1979)	20
National Conference of Commissioners on Uniform State Laws, UNIFORM JUVENILE COURT ACT § 26(a) (1968)	12

TABLE OF AUTHORITIES—Continued

Page

National Council on Crime and Delinquency, MODEL RULES FOR JUVENILE COURTS, Rule 3, 13, 39 (1960) 12

Note, *Psychological Parents* v. *Biological Parents: The Courts Response to New Directions in Child Custody Dispute Resolution*, 17 J. FAM. L. 545 (1978-1979) 28

Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521 (1977-78) 12

U.S. National Center on Child Abuse and Neglect, CHILD ABUSE AND NEGLECT STATE REPORTING LAWS (1979) 8

U.S. National Center on Child Abuse and Neglect, FEDERAL STANDARDS FOR CHILD ABUSE AND NEGLECT PREVENTION AND TREATMENT PROGRAMS, Standard B-5 (1978) 12

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN AND THE GUARDIAN AD LITEM PROGRAM OF THE DISTRICT OF COLUMBIA *AMICI CURIAE*

INTEREST OF *AMICI CURIAE* [1]

The National Association of Counsel for Children is a voluntary, national membership organization concerned

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[1] Letters from the parties consenting to the submission of this *Amici Curiae* brief have been filed with the Clerk of the Court.

with the legal rights and interests of children who are the subjects of child protective, matrimonial, and custody litigation. Established in 1977, the Association has 450 members in 39 States. Membership is predominantly lawyers and judges, but also includes pediatricians, social workers, child psychiatrists and psychologists, law enforcement officers, and private citizens. The Association issues standards and guidelines on the representation of children, holds seminars on legal proceedings affecting children, prepares training and resource materials, and publishes a quarterly newsletter, *The Guardian.*

The Association's interest goes beyond its generalized concern over the legal rights of children. The majority of the Association's members are involved in representing children before the courts; many other members provide court related services to them. Hence, the outcome of this case will have a tangible impact on the work and professional practice of the Association's members.

The Guardian Ad Litem Program of the District of Columbia grew out of the Volunteer Attorneys Program which was established in the Juvenile Court in 1966. Since that time, through the provision of independent legal representation, the Program has sought to protect the best interests and legal rights of allegedly abused and neglected children before the court. The Program now has sixty attorneys who represent all of the approximately 2500 children before the court because of alleged parental maltreatment.

One of the responsibilities of Program attorneys is to initiate proceedings to terminate the parent-child relationship when it is clear that the child's interests require placement in an adoptive home. Thirty to forty termination motions are filed annually. The Guardian Ad Litem Program therefore has a direct interest in this proceeding, because it will have an immediate and compelling impact on its clients and its own activities.

Because of their interest and experience with termination proceedings and their role as children's representatives in court proceedings, the National Association of Counsel for Children and the Guardian Ad Litem Program of the District of Columbia respectfully submit their position with regard to the controversy now before this Court.

QUESTIONS PRESENTED BY THE *AMICI*

1. Under the Federal Rules of Civil Procedure and the Due Process Clause of the Fourteenth Amendment, should the children who are the subjects of this proceeding be given party status *before this Court* and provided with legal representation?

2. If the children are not represented before this Court and the Court holds that the Delaware statute is unconstitutional or was applied unconstitutionally, do the children have a right to a subsequent hearing to determine whether their best interests require that the Court's decision be given nonretroactive application?

STATEMENT OF THE CASE

The immediate issues before this Court are the constitutionality of Delaware's statutory scheme for terminating parental rights and the validity of an order, first entered in 1975, terminating the parental rights of Doe and Roe. But the ultimate issue in this case is the future of the five children who are the subjects of this proceeding—Amy, Bill, Charles, David and Ellen. It is their right to a permanent, stable, and nurturing home environment that has been the reason for the many years of judicial proceedings before the Delaware courts—and now before this Court.

This case reaches this Court after eight years of progressively more extreme State action to protect the

children from what the Delaware authorities determined was a harmful child rearing situation. The children have been in the care of the State of Delaware for almost all of their lives:

- Amy has been out of her parents' care for seven of her nine years of life;
- Bill has been out of his parents' care for seven of his eight years of life;
- Charles has been out of his parents' care for five and one half of his six years of life;
- David has been out of his parents' care for four and two thirds of his five years of life; and
- Ellen has been out of her parents' care for four and two thirds of her five years of life.[2]

The children have not seen Doe or Roe at least since 1975. *Appellee's Motion To Dismiss Or Affirm* 2 n.1. The Appellee informs *Amici* that, for some time, all five children have been in pre-adoptive foster homes. (The State has postponed formal adoption proceedings, pending the outcome of this appeal.) If the decision to terminate parental rights is affirmed, the children are slated to be adopted by the foster parents with whom they live. If the decision is overturned, presumably Doe and Roe will seek to regain custody of the children, or at least reassert their right to visitation. *Id.*

SUMMARY OF THE ARGUMENT

This case is not simply a legal proceeding to test the constitutionality of the Delaware statute authorizing the termination of parental rights. The future of five chil-

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[2] All figures are approximate, and are based on the full text opinion of the Supreme Court of Delaware, *In the Matter of Five Minor Children*, Appendix A of the *Appellants' Jurisdictional Statement.*

dren hinges on its outcome. Consequently, the five children who are the subjects of this proceeding have an interest in the outcome of the proceeding *before this Court* that is at least equal to, if not greater than, that of either of the named parties.

I

Before this Court, both Doe and Roe and the State of Delaware claim to speak for the children's best interests, but neither can do so because they each can be expected to pursue their own interests which may not be consistent with those of the children. Therefore, under the Federal Rules of Civil Procedure these children should be given party status *before this Court.* At the same time, an attorney should be appointed to represent them.

The Due Process Clause of the Fourteenth Amendment also requires that the children be given party status and provided with legal representation. The children's interest in a permanent, stable and nurturing home environment—at stake in this proceeding—is a constitutionally protected liberty interest stemming from the right enjoyed by biological families to be free from unwarranted state intervention.

The long time that these five children have spent in foster care establishes an independent reason to hold that the children enjoy a liberty interest in the outcome of the proceeding that requires the appointment of counsel. These five children have been in foster homes maintained by the State of Delaware and have been without parental visitation for almost all of their lives. In the time that these five children have been in their pre-adoptive homes, their foster parents may have become their psychological parents, making their relationship with them sufficiently akin to that of a biological family to merit similar constitutional protection.

However, it may not be necessary for this Court to reach the issue of the liberty interest in family privacy enjoyed by foster children. There is a real danger that the 1976 order terminating parental rights will be vacated without due consideration of the children's dependence on the emotional and familial bonds that may exist between them and their pre-adoptive foster parents. The possible harm that could result will be the direct consequence of this Court's decision. (The possibility of strong emotional and familial bonds between these children and their foster parents arises because of the proper functioning of Delaware's child welfare system and the inexorable running of the calendar, not because of a breakdown in the system.) Therefore, the children have a "state created right" in the continuation of their foster care placement and a subsequent adoption, if that would be in their best interests.

For all of the above reasons, the children should be given party status *before this Court* and an attorney should be appointed to represent them.

II

If this Court holds that the Delaware statute is unconstitutional or was applied unconstitutionally, and Delaware courts are forced to vacate the termination order, it is possible that the children will suffer serious and longlasting harm. Therefore, their best interests may require that the Court's decision be given nonretroactive, *i.e.*, prospective, application. The proposition that the passage of time from the first assertion of parental rights to its final resolution (in their favor) may prevent a full vindication of those rights raises many serious problems. However, children are not property to be returned to their "lawful owners" regardless of the emotional damage to them.

Without the children's participation, through a legal representative, in the proceeding before this Court, it is not possible to determine what disposition will be in their best interests. Therefore, if the Delaware statute is held to be unconstitutional, and a sufficient inquiry into the children's best interests cannot be conducted by this Court, the case should be remanded to the Delaware courts for their determination as to whether the Court's decision should be given nonretroactive application, based on what would be in the best interests of each individual child—as determined by a subsequent evidentiary hearing.

ARGUMENT

I. UNDER THE FEDERAL RULES OF CIVIL PROCEDURE AND THE DUE PROCESS CLAUSE, THE CHILDREN WHO ARE THE SUBJECTS OF THIS PROCEEDING SHOULD BE GIVEN PARTY STATUS BEFORE THIS COURT AND PROVIDED WITH LEGAL REPRESENTATION.

These proceedings have had—and will continue to have—a direct, substantial, and longlasting effect on the life of each of the five children who are the subjects of this proceeding. From the time each of the five children was removed from Doe's and Roe's custody, the Delaware authorities have decided where and with whom they would live, whether they would see their parents, and who would care, protect, and nurture them until their maturity. As the result of Delaware state action, their "future life, security and stability are irrevocably changed." *Drummond* v. *Fulton County Department of Family & Children's Services*, 547 F.2d 835, 836 (5th Cir. 1977).

Delaware courts, like those in all States, have discretionary authority to appoint a guardian *ad litem* or other representative for children whose interests may conflict

with those of their parents.[3] DEL. CODE ANN., Fam. Ct. Rules, Rule 360 (1974). In fact, according to the Delaware Attorney General, the express policy of the State of Delaware is that: "In all civil actions involving either abuse or neglect of children, a social worker from Child Protective Services of the Division of Social Services, [*sic*] is appointed by the court to act as guardian *ad litem* for the alleged abused or neglected child."[4] Despite these five children's deep interest in the outcome of these proceedings, and despite this express policy, they have never been provided with independent representation.[5]

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[3] Recently, there has been a legislative movement to mandate such appointments in child protective and termination proceedings. At least in part, this expansion of children's representation has been the result of impetus from the United States Congress. Under the Federal Child Abuse Prevention and Treatment Act, in order to be eligible for Federal child abuse funds, States must "provide that in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child." 42 U.S.C. § 5103(b)(2)(G) (1978). In response to this Federal requirement, at least 42 States now provide a guardian ad litem in all judicial proceedings resulting from child abuse and neglect. In most States, this appointment is mandated by State law. *See, e.g.*, N.Y. FAM. CT. ACT § 249 (McKinney 1979). But other States have coupled a permissive statute with a mandatory, or at least seemingly mandatory, practice of appointments, submitting documentary evidence that the appointments are in fact made in all cases. Delaware is in the latter category. *See generally*, U.S. National Center on Child Abuse and Neglect, CHILD ABUSE AND NEGLECT STATE REPORTING LAWS 24-25 (1979).

[4] Attached as Appendix A.

[5] While the appointment of a State social worker is not the most effective means of assuring adequate representation for the children, at least it would have created a fiduciary relationship between the State and the children, which would

A. The Federal Rules Of Civil Procedure Require That The Children Be Given Party Status Before This Court And Provided With Legal Counsel.

This case is not simply a legal proceeding to test the constitutionality of the Delaware statute authorizing the termination of parental rights. The future of five children hinges on its outcome. If this Court holds that the Delaware proceedings are free from constitutional defect, the decision to terminate parental rights will become final and the children will be freed for adoption by their pre-adoptive foster parents. On the other hand, if this Court holds that the Delaware statute is unconstitutional or was applied unconstitutionally,[6] the children's situation will revert to temporary foster care under Delaware's neglect and dependency laws. Depending on what this Court decides, the children (1) may have the legal tie to their biological parents permanently severed, (2) may be left in the uncertain limbo of foster care, with the possibility that they may remain in that temporary status for years, or (3) may be returned to Doe or Roe, perhaps in deeply harmful circumstances.[7] Consequently, the five children who are the subjects of this proceeding have an interest in the outcome of the proceeding *before this Court* that is at least equal to, if not greater than, that of either of the named parties.

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formally require the State to consider the best interests of the children in its handling of this litigation.

[6] Although *Amici* take no position on these issues, they wish to note their general support for the proposition that child protective and termination statutes should contain a specification of the harm or threatened harm to the child that would result if the child were to remain in the care of his parents.

[7] These latter two possibilities are further discussed in Point IIA, *infra*.

Before this Court, both Doe and Roe and the State of Delaware claim to speak for the children's best interests, *Appellants' Opposition To Appellee's Motion To Dismiss or Affirm* 5; *Appellee's Motion To Dismiss or Affirm* 9 & 16, but neither can do so because, as described below, they each can be expected to pursue their own interests which may not be consistent with those of the children. Therefore, under Rule 19(a)(2) of the Federal Rules of Civil Procedure, these children should be given status *before this Court.* At the same time, an attorney should be appointed to represent them pursuant to Rule 17( ).[8]

Under normal circumstances, parents are presumed to represent and to speak for their children's best interests. *Parham* v. *J.R.*, 442 U.S. 584, 603-604 (1979); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). But: "As with so many other legal presumptions, experience and reality rebut what the law accepts as a starting point; the incidence of child neglect or abuse attests to this." *Parham* v. *J.R.*, 442 U.S. at 603.

Doe and Roe apparently do not challenge the initial finding of neglect made by the Delaware courts (as opposed to the decision to terminate parental rights made in a separate and subsequent proceeding). Although Doe and Roe have the parental right to assert what they consider to be in the children's best interests, it is not unfair to presume that their prime goal, like that of so many parents who have had their children removed from them, is to regain custody of the children.

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[8] Appointment of an attorney rather than a guardian ad litem is proposed because the situation precludes the children's appointed representative from being the sole party to assert which outcome would be in the children's best interests. *Smith* v. *Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 841 n.44, 842 n.45 (1977) [hereinafter *"OFFER"*].

The State of Delaware also cannot claim to represent the best interests of the children, even though the rationale for state intervention into family life is to protect children. *Prince* v. *Massachusetts*, 321 U.S. 158, 168 (1944). This Court has repeatedly held that the state's good intentions alone do not justify the conclusion that it is acting in an individual's best interests. *See, e.g., In re Gault*, 387 U.S. 1, 16 (1966). Furthermore: "When terminations are viewed as a means of facilitating adoptions, one becomes aware that they will always promote the interests of the state regardless of the peculiar interests of any single child; terminations aid the state in meeting the demand for 'adoptable' children while also relieving it from the financial costs of long-term foster care, homemaker services, and other welfare or public services." *State ex rel. Juvenile Department of Multnomah County* v. *Wade*, 19 Ore. App. 314, 322, 527 P.2d 753, 757, *reh'g denied* 19 Ore. App. 835, 528 P.2d 1382 (1974), *appeal dismissed sub nom. Wade* v. *Oregon*, 423 U.S. 806 (1975); *Drummond* v. *Fulton County Department of Family & Children's Services*, 563 F.2d 1200, 1210 (5th Cir.) (*en banc*), *cert. denied* 437 U.S. 910 (1977). *But cf. In re D.*, 24 Ore. App. 601, 610, 547 P.2d 175, 181 (1976), *cert. denied* 429 U.S. 907 (1976) (limiting the mandatory appointment of counsel for children to situations in which it would serve an "identifiable purpose"). The State's failure to follow its own policy concerning the appointment of an independant representative for the children, in the proceedings below, underscores the limits of the State's ability to protect the children's separate interests.

One of the State's goals before this Court must be presumed to be the defense of its statutory framework and the vindication of its eight year involvement with this family. Even if the Attorney General was to determine that, in the children's best interests, they should be returned to their parents—as the State's chief legal of-

ficer—he might feel bound to defend the State law and the State actions under it. *Cf. Tshovich* v. *United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972) (When a public official must protect specific individual interests and public interests, and this dual obligation may dictate different approaches to litigation, the individuals affected are entitled to intervene to protect their interests).

The inherently conflicting interests of children, parents, and the State have led almost every model law or standard addressing the termination of parental rights or child protective court action to recommend the independent representation of children.[9] Commentators have been equally supportive of the child's right to separate representation.[10]

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[9] *See, e.g.*, U.S. National Center on Child Abuse and Neglect, FEDERAL STANDARDS FOR CHILD ABUSE AND NEGLECT PREVENTION AND TREATMENT PROGRAMS, Standard B-5 (1978); IJA/ABA Juvenile Justice Standards Project, COUNSEL FOR PRIVATE PARTIES, § 1.1, 2.3 (1977); National Conference of Commissioners on Uniform State Laws, UNIFORM JUVENILE COURT ACT § 26(a) (1968); National Council on Crime and Delinquency, MODEL RULES FOR JUVENILE COURTS, Rule 3, 13, 39 (1960).

[10] *See, e.g.*, J. Goldstein, A. Freud, A. Solnit, BEFORE THE BEST INTERESTS OF THE CHILD 111, *et seq.* (1979); Katz, *Model Act to Free Children For Permanent Placement*, § 14 13 FAM. L. Q. 330, 339 (1979); Redeker, *The Right of an Abused Child to Independent Counsel and the Role of the Child Advocate in Child Abuse Cases*, 23 VILL. L. REV. 521 (1977-78); Genden, *Separate Legal Representation for Children: Protecting the Rights and Interests of Minors in Judicial Proceedings*, 11 HARV. C.R.-C.L. L. REV. 565 (1976); Foster & Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343 (1972).

Amici are not arguing that all foster children are necessarily entitled to representation by independent counsel. Rather, we argue that the particular situation of these five children calls for such appointment because they have "an interest in the subject of the action" and are "so situated that the disposition of the action in [their] absence may . . . as a practical matter impair or impede [their] ability to protect that interest. . ." FED. R. CIV. P. 19 (a)(2). *Cf. OFFER*, 431 U.S. at 850, 852 (holding that the Due Process Clause does not make the need for counsel "automatic" in "all preremoval hearings"). In *OFFER*, 431 U.S. at 841 n.44, this Court noted the children's need for independent representation in a similar situation:

> In this case, . . . the State, the natural parents, and the foster parents, all of whom share some portion of the responsibility for guardianship of the child, . . . are parties, and all contend that the position they advocate is most in accord with the rights and interests of the children. In this situation, the District Court properly appointed independent counsel to represent the children, so that the court could have the benefit of an independent advocate for the welfare of the children, unprejudiced by the possibly conflicting interests and desires of the other parties.

The inability of either named party to adequately represent the interests of these children is perhaps best evidenced by the fact that, in the papers so far submitted to this Court, neither party has raised the issue of the children's need for emotional and familial permanency.[11] The fact that an issue of such fundamental importance to the children has been neglected by both parties completely undermines their assertions that they can speak for the children. If these five children are not given party status before this Court and do not have an at-

[11] *See* Points IB and IIA, *infra*.

torney appointed to represent them, there can be no assurance that considerations of their best interests will be raised.

Such action would be in the Court's own interest as well, because it will encourage the orderly and complete consideration of this case and help prevent erroneous judicial decision-making. *See Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). For example, if the children were parties before this Court, the matters that they might raise, through appointed counsel, include: whether the Delaware statute was applied constitutionally as to them; whether their lack of representation at the State court level "led to . . . easily identifiable errors and omissions which are . . . of such . . . constitutional magnitude as to require vacating the judgment below",[12] *Amicus Brief of the American Civil Liberties Union* 34-35; and whether the protection of each child's interests would require prospective application of the Court's decision, if the Delaware statute is found to be unconstitutional.[13]

The fact that this case has reached the appellate level does not preclude the appointment of counsel. *See, e.g., Drummond* v. *Fulton Co. Dept. of Family and Children's Services*, 563 F.2d at 1204. The procedure would be equivalent to one in which a third party seeks to intervene in a proceeding already before this Court. Under the Federal Rules of Civil Procedure, intervention is a

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[12] Without access to the full record and without knowledge of the children's present situation, these *Amici* cannot reach this conclusion. It may be, for example, that the original termination order was in the children's best interests or that their present situation requires that the termination order be sustained. In fact, the ensuing delay in finalizing the children's legal status might well be contrary to their best interests. *See* Point II A, *infra.*

[13] *See* Point II, *infra.*

matter of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." FED. R. CIV. P. 24(a)(2). A person may intervene at the appellate level even though he was not a party or intervenor to an action below. *Hurd* v. *Illinois Bell Tel. Co.*, 234 F.2d 942 (7th Cir.), *cert. denied* 352 U.S. 918 (1956). Intervention is also permitted before this Court. *Eastern-Central Motor Carriers Assoc.* v. *United States*, 321 U.S. 194, 198-199 n.5 (1944).

Accordingly, Federal courts have established a three-part test for intervention: (1) the sufficiency of the interest affected by the disposition, (2) the adequacy of the existing parties' representation of the applicant's interest, and (3) the timeliness of the application. *International Tank Terminal, LTD* v. *M/V Acadia Forest*, 579 F.2d 964 (5th Cir. 1978); *U.S. Postal Service* v. *Brennan*, 579 F.2d 188 (2d Cir. 1978). When a party seeks to intervene for the first time at the appellate level, courts pay particular attention to whether prejudice may result to any of the named parties. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO Local 283* v. *Scofield*, 382 U.S. 205, 215 (1965).

The situation of these five children satisfies each of these considerations. As discussed throughout this brief, the children have a substantial interest in the outcome of this proceeding, which neither named party can adequately represent. Moreover, the parties will not be prejudiced by the children's intervention. Both parties will be free to pursue their respective arguments about the constitutionality of the Delaware termination statute and procedures. Besides addressing the constitutional issues

before this Court, the only issue that the children, through their representative, would raise is the need to protect their best interests—an issue already before this Court. After failing to appoint an independent representative for the children, as its own policy required, the State cannot now claim prejudice. Similarly, the parents cannot claim to be prejudiced by an independent assessment of their children's best interests. They, like the State, would still be able to assert their views concerning the best interests of the children. *See OFFER*, 431 U.S. at 841 n.44.

Finally, the named parties cannot claim that the children's failure to assert their right to participation and representation in these proceedings constitutes a waiver of that right. The children range in age from five to nine years; unrepresented children of such tender years cannot be held to have waived their procedural and constitutional rights by their failure to exercise them. *See, e.g., Dixon* v. *United States*, 197 F.Supp. 798 (W.D. S.C. 1961).

B. The Due Process Clause Of The Fourteenth Amendment Requires That The Children Be Given Party Status Before This Court And Provided With Legal Representation.

1. *Protection of Family Relationships.*

The children's interest in a permanent, stable and nurturing home environment—at stake in this proceeding—is a liberty interest protected by the Due Process Clause of the Fourteenth Amendment. As this Court said in *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1977) (quoting *OFFER*, 431 U.S. at 863, Stewart, J., concurring) (emphasis added):

> We have little doubt that the Due Process Clause would be offended "[i]f the State were to attempt to

> force the breakup of a natural family, over the objections of the parents *and the children*, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.

For the purposes of the instant case, the operative language is: "*over the objections of . . . the children.*" The right to family privacy and permanence is enjoyed by both the parents and the children. A child is more dependent on the support and nurturance provided by the family than the adult parent, and, therefore, has an equal if not greater interest in maintaining the family relationship. "The parent has a 'right' to rear its child, and the child has the 'right' to be raised by its parent." *Bennett* v. *Jeffreys*, 40 N.Y.2d 543, 546, 387 N.Y.S.2d 821, 824, 356 N.E.2d 277, 281 (1976). *Accord*, *Brown* v. *Guy*, 476 F.Supp. 771, 773 (D. Nev. 1979); *Sanchez* v. *Texas Dept. of Human Resources*, 581 S.W.2d 260, 262 (Tex. 1979). "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 74 (1976); *In re Gault*, 387 U.S. at 13.

The right of children to protest when the State seeks to breakup a biological family tends to be forgotten because the parents are the ones who usually object.[14] However, to protect the independent interests of children, courts are increasingly recognizing the child's separate right to counsel. *See, e.g.*, *Drummond* v. *Fulton County Department of Family & Children's Services*, 547 F.2d

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[14] If they do not, the child's interest in staying in the natural home is presumably lessened, although situations can be imagined in which the parents may not object because of fear of offending the authorities.

835 (5th Cir. 1977); *Sims* v. *State Dept. of Public Welfare*, 438 F.Supp 1179, 1198 (S.D. Tex. 1977), *rev'd on other grounds sub nom. Moore* v. *Sims*, 442 U.S. 415 (1979); *Roe* v. *Conn*, 417 F.Supp. 769 (M.D. Ala. 1976); *Alsager* v. *District Court of Polk County*, 406 F.Supp. 10 (S.D. Iowa 1975), *aff'd in part*, 545 F.2d 1137 (8th Cir. 1976); *Matter of Fish*, 569 P.2d 924 (Mont. 1977); *In re Orlando F.*, 40 N.Y.2d 103, 386 N.Y.S.2d 64 (1976); *Wagstaff* v. *Superior Court*, 535 P.2d 1220 (Ala. 1975); *Stapleton* v. *Dauphin County Welfare Services*, 228 Pa. Super 371, 324 A.2d 562 (1974).

The situation of these five children meets the criteria for the provision of Due Process protections set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).[15] They have a sufficient interest in the outcome of the proceeding; their absence will pose a substantial risk of an erroneous decision; and there are no countervailing interests against representation.

Therefore, *Amici* concur with the arguments made by the *Amicus* briefs of the American Civil Liberties Union and the Legal Aid Society of the City of New York concerning the children's right to counsel, although we would argue that the appropriate remedy for prior non-representation is the appointment of counsel for the children in the proceeding now before this Court.[16]

The long time that these five children have spent in foster care establishes an independent reason to hold that they enjoy a liberty interest in the outcome of the proceeding that requires party status and the appointment of counsel. These five children have been in foster homes

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[15] This test has been utilized by this Court in the specific context of state-family conflicts. *Parham* v. *J.R.*, 442 U.S. at 600; *OFFER*, 431 U.S. at 847-848.

[16] *See* n.12, *supra*, and accompanying text.

maintained by the State of Delaware and have been without parental visitation for almost all of their lives, and, as this Court has previously recognized, "many children, particularly those that enter foster care at a very early age and have little or no contact with their natural parents during extended stays in foster care, often develop deep emotional ties with their foster parents." *OFFER*, 431 U.S. at 836, footnotes omitted. *See generally*, J. Goldstein, A. Freud, A. Solnit, BEYOND THE BEST INTERESTS OF THE CHILD (1973). Thus, the situation of these children raises the "complex and novel question" of the due process rights of children in foster care that this Court did not reach in *OFFER*, 431 U.S. at 847.[17]

The constitutional protection family relationships enjoy stems from the complex emotional relationships involved as well as the simple biological tie. *Moore* v. *City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.); *OFFER*, 431 U.S. at 844; *Wisconsin* v. *Yoder*, 406 U.S. 205, 231-233 (1972). The longer a loving and stable foster care placement continues, the greater becomes the possibility of ties between the foster child and the foster parent, and the greater becomes the child's presumptive interest in their continuance. As this Court strongly suggested in *OFFER*, there are situations when the foster child's interest in a permanent and stable home environment may enjoy constitutional protection:

> No one would seriously dispute that a deeply loving and independent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship. At least where a child

[17] In *OFFER*, this Court did not reach the question of the children's constitutional rights because it held that their best interests required no more than the procedure already provided by the State of New York.

> has been placed in foster care as a infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions, as a natural family. For this reason, we cannot dismiss the foster family as a mere collection of unrelated individuals. *OFFER*, 431 U.S. at 844-845. (footnotes omitted.)

Since *OFFER*, all Federal courts considering the issue have recognized that, at some point, the duration of a loving foster care placement, and the consequent emotional and familial ties it creates, establish a liberty interest in its continuance. *Kyees* v. *County Department of Public Welfare of Tippicanoe Co.*, 600 F.2d 693, 699 (7th Cir. 1979); *Drummond* v. *Fulton County Department of Family and Children's Services*, 563 F.2d at 1209; *Sherrad* v. *Owens*, 484 F.Supp. 728, 740-741 (W.D. Mich. 1980). *See also*, *Caban* v. *Mohammed*, 441 U.S. 380, 402 (1979) (Stevens, J., dissenting) ("The state interest in facilitating adoption in appropriate cases is strong—perhaps even 'compelling'"). In fact, at least one State supreme court has held that in certain "extraordinary circumstances", an independent right to termination and adoption arises, even in the absence of a statutory provision, because "the psychological trauma of removal is grave enough to threaten destruction of the child." *Bennett* v. *Jeffreys*, 40 N.Y.2d at 550, 387 N.Y.S.2d at 827, 356 N.E.2d at 284.

In the time that these five children have been in their pre-adoptive homes, their foster parents may well have become their psychological parents, making "the relation of foster parent to foster child sufficiently akin to the concept of 'family' recognized in [the Court's] precedents to merit similar protection." *OFFER*, 431 U.S. at 842. *See also*, Muench & Levy, *Psychological Parentage: A*

Natural Right, 13 FAM. L. Q. 129 (1979). This possibility gives the children a presumptive liberty interest in the substitute family relation sufficient to require the appointment of counsel to represent them in this proceeding.

2. *The Protection of a State Created Right.*

It may not be necessary for this Court to reach the issue of the liberty interest in family privacy enjoyed by foster children. For, "a person's liberty is equally protected, even when the liberty is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government." *Wolf* v. *McDonnell*, 418 U.S. 539, 558 (1974); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970).

Ordinarily, foster children are protected by "the requirement of state law that decisions about their placement be determined in the light of their best interests." *OFFER*, 431 U.S. at 860 (Stewart, J., concurring). However, unlike the situation in *OFFER*,[18] there is a real danger that the 1976 order terminating parental rights will be vacated without due consideration of the children's need for continuity and permanence.[19] The possible harm that could result will be the direct consequence of this Court's decision. *Compare with O'Bannon* v. *Town Court Nursing Center*, 78-1318, at 12, *et seq.*

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[18] In *OFFER*, the Court seemed to assume that the purpose of the challenged procedures was to "[inquire] into the child's best interests." 431 U.S. at 852. Similarly, Justice Stewart noted that "transfers in and out of foster 'families are made for a variety of reasons and often involve no more than informed predictions as to what would best serve . . . the safety and welfare of the [child]' ". 431 U.S. at 859 (Stewart, J., concurring) quoting *Meachum* v. *Fano*, 427 U.S. 225, 226 (1976).

[19] *See* Point IIA, *infra.*

(U.S. Sup.Ct. June 23, 1980). Therefore, the children have a "state created right"—in the continuation of the foster placement and the adoption process, if that is in their best interest—which cannot be "arbitrarily abrogated." *Meachum* v. *Fano*, 427 U.S. at 226 (quoting *Wolf* v. *McDonnell*, 418 U.S. at 557).[20]

The possibility of strong emotional and familial bonds between these children and their foster parents arises not because of "a breakdown of the . . . system," *OFFER*, 431 U.S. at 862. (Stewart, J., concurring), but because of the proper functioning of Delaware's child welfare system and the inexorable running of the calendar. A presumptively valid judicial order had been entered to sever the parent/child relationship. The purpose of the children's pre-adoptive foster placements was not, as they were in *OFFER*, to "prepare the child for his return to his real parents", but, rather, to provide a "permanent substitute for the natural home." *Id.* at 861. To

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[20] *Amici* are not arguing that the right to continued foster care placement is enjoyed by the foster parents, a position this Court apparently rejected in *OFFER*. Rather, under facts such as these, the right innures to the children, whether or not the foster parents have an analogous right. [Although the Court's opinion in *OFFER* seems to equate the rights of foster parents with those of foster children, 431 U.S. at 841-842 nn.44-45, as Justice Stewart pointed out: ". . . this is not a case where failure to grant the [foster] parents their requested relief will inevitably tend to '[dilute] or adversely [affect]' the alleged constitutional rights of the children. Denying the [foster] parents a hearing simply has no effect on the children's separate claim to a hearing, and does not impair their alleged constitutional rights." *Id.* at 857 n.1, quoting *Craig* v. *Boren*, 429 U.S. 190, 195-196 (1976).] Hence, the discussion in both the Court's opinion and Justice Stewart's concurrence about the contractual relationship between the foster parents and the State, *id.* at 845-846, 856, is not applicable to this case.

consider the purpose of these children's foster placements as otherwise would be to require State child welfare officials to encourage the continuation of parent/child relationships even when they believe that doing so will be harmful to the children involved, merely because of the possibility that a termination order might eventually be overturned.

These children must have the right to be more than helpless bystanders, unable to be heard, while their whole future is being decided. When, as here, the children's presumptive "parents" (their pre-adoptive foster parents) apparently do not have the right to object,[21] the only other person able to object is the foster child. Surely there arises an independent right for these foster children to be heard before "being condemned to suffer grievous loss". *Joint Anti-Fascist Comm.* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

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Amici recognize that if the Court decides that the children should be given party status and a legal representative, it will have to take such action *sua sponte*. *See, e.g., Drummond* v. *Fulton Co. Dept. of Family and Children's Services*, 563 F.2d at 1204. However, if this Court does not act, who will? Certainly not the State and certainly not the parents, each of whom claim that they represent the best interests of the children. The children should not be penalized because neither named party has taken this necessary step.

If the Court deems it appropriate, counsel for the *Amici* stand ready to represent these children before this Court or to assist the Court in obtaining counsel for them.

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[21] *See* n.20, *supra*.

II. IF THE CHILDREN ARE NOT REPRESENTED BEFORE THIS COURT AND THIS COURT HOLDS THAT THE DELAWARE STATUTE IS UNCONSTITUTIONAL, THE CHILDREN HAVE A RIGHT TO A SUBSEQUENT EVIDENTIARY HEARING TO DETERMINE WHETHER THEIR BEST INTERESTS REQUIRE THAT THE COURT'S DECISION BE GIVEN NONRETROACTIVE APPLICATION.

A. If This Court Holds That The Delaware Statute Is Unconstitutional, The Best Interests Of The Children Might Require That The Court's Decision Be Given Nonretroactive Application.

If the Court holds that the Delaware statute is unconstitutional or was applied unconstitutionally, the children's welfare will be threatened. For, if the termination order is vacated, the children's status will revert to temporary foster care under Delaware's neglect and dependency laws. Then Doe or Roe may renew their claim that Delaware's laws require *present unfitness* for the state to maintain custody and that the children should therefore be returned to them. Transcript of Proceedings, Appendix I of *Appellants' Jurisdictional Statement* 2i. Since it is possible that either Doe or Roe is presently fit, the State may be forced to return the children to Doe or Roe's custody—not because such a return would be in the children's best interests, but because the State lacks statutory grounds for their continued custody.[22]

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[22] Although Delaware's child protective statutes are ambiguous on this question, and there is no controlling decisional authority, the State's dispositional authority under its "neglect" and "dependency" laws seems to be limited to situations of *present parental unfitness. Cf., Alsager* v. *District Court of Polk County*, 384 F.Supp. 643, 652 (S.D. Iowa 1974) (If the parents are presently fit, "there seems to be no barrier to [their] arguing their fitness to be parents of their own children to the appropriate state authorities.")

In fact, there is reason to believe that returning the children to Doe and Roe, who now may be strangers to them, could cause "intense trauma and possibily permanent emotional damage." Ketcham & Babcock, *Statutory Standards for the Involuntary Termination of Parental Rights*, 29 RUT. L. REV. 530, 537 (1976). When a foster child has known only one loving family and is incapable of distinquishing it from his biological one, then the foster family is that child's "natural family" and removal from it will be no less destructive to the child. *Bennett* v. *Jeffreys*, 40 N.Y.2d at 550, 387 N.Y.S. 2d at 827, 356 N.E.2d at 284. *See also*, *OFFER*, 431 U.S. at 844-845.

Even if the children will not be returned to Doe or Roe when their status reverts to temporary foster care, they will nevertheless face a continuation of the uncertainty and impermanence that the last five years of appeals have produced. It could be another two years before their permanent status is finally adjudicated. What, if anything, should the parties do in the interim about the emotional relationship, or lack thereof, between the children and Doe and Roe? Should they maintain the *status quo*? Or, on the ground that the third hearing on termination *may* result in the return of the children to Doe and Roe, should Roe, Doe, and the State—after all these years—seek to reawaken what are apparently long dead, or at least dormant, parental ties, only to face the possibility of severing them once more.

Thus, if the Delaware statute is held to be unconstitutional, the rights of the children to emotional and familial permanency may require that the order terminating parental rights be sustained. For example, in *Syrovatka* v. *Erlich*, 608 F.2d 307, 311 (8th Cir. 1979), the court held that, although there had been a denial of due process in making the original termination order, the disruption of the ensuing thirteen year adoption

would be a "cruel travesty of justice." To prevent a similar injustice in the instant case, it may be necessary to give this Court's decision nonretroactive, *i.e.*, prospective, application. *Cf. Caban* v. *Mohammed*, 441 U.S. at 415-416 (Stevens, J., dissenting) (Because the Court crossed a "new constitutional frontier" in its decision, reliance interests in prior adoption decrees "unquestionably foreclose retroactive application of the ruling".)

The approach *Amici* is proposing is consistent with the modern view favoring flexible remedies in constitutional litigation. In the past, it was said that an unconstitutional statute "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton* v. *Shelby County*, 118 U.S. 425, 442 (1886). But, "in the last few decades", this Court has "recognized the doctrine of nonretroactivity . . . many times, in both constitutional and nonconstitutional cases." *Lemon* v. *Kurtzman*, 411 U.S. 192, 197-198 (1973).

> However appealing the logic of *Norton* may have been in the abstract, its abandonment reflected our recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing the doctrine of nonretroactivity. *Id.* at 199, citations omitted.

In constitutional litigation, to determine the "appropriate scope of federal equitable remedies", *id.* at 199, requires "a special blend of what is necessary, what is fair, and what is workable. 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.'" *Id.* at 200, footnote

omitted, quoting *Brown* v. *Board of Education*, 349 U.S. 294, 300 (1955).

In *Lemon*, the Court laid out a four part test to determine whether a decision should be given nonretroactive effect: (1) would nonretroactivity "substantially undermine the constitutional issues at stake", *id.* at 201; (2) would the resulting "reliance interests" offset the constitutional harm, *id.* at 203; (3) was there "bad faith" or a "plainly unlawful statute", *id.* at 297; and (4) do considerations of "federalism" suggest that the remedy be confined to future cases, *id.* at 208.

In the instant case, all but one of these considerations is satisfied. Doe's and Roe's constitutional rights as biological parents would be undermined if the decision were given nonretroactive effect, and they were thereby prevented from regaining custody of their children. Parents have a substantial right to raise their children free from unwarranted governmental interference. However, parental rights have always been limited to situations in which the child's health or welfare is not unreasonably harmed or endangered. *Wisconsin* v. *Yoder*, 406 U.S. at 230; *Prince* v. *Massachusetts*, 321 U.S. at 166. Furthermore, this Court has recognized that when there is a conflict between the rights and interests of children and parents, in many situations, those of the children must prevail. *See, e.g., Bellotti* v. *Baird*, 442 U.S. 662 (1979); *Planned Parenthood of Central Missouri* v. *Danforth, supra.*

Although the potential conflict between the legal rights of parents and the interests of their children who are in foster care has not been squarely considered by this Court, in the cases that touch on the issue, this Court has unfailingly acted to protect the apparent best interests of the children. As Justice Stewart said in *OFFER*: "the protection that foster children have is simply the requirement of state law that decisions about

their placement be determined in light of their best interests." *OFFER*, 431 U.S. at 860 (Stewart, J., concurring). This principle is the pre-eminent consideration in child custody decision-making. It is frequently applied even when there is no parental unfitness, if the specific situation requires it. For example, in *Rothstein* v. *Lutheran Social Services of Wisconsin and Upper Michigan*, 405 U.S. 1051 (1972), in vacating an order terminating parental rights and remanding the case for further consideration in light of *Stanley* v. *Illinois*, 405 U.S. 645 (1972), this Court was careful to advise the lower court that there should be "due consideration for the completion of adoption proceedings and the fact that the child has apparently lived with the adoptive family for the intervening period of time."

State courts have also recognized the pre-eminence of the children's best interests in child custody decision-making, even in the face of competing parental legal rights. *See, e.g., Coffey* v. *Dept. of Social Services of Baltimore City*, 41 Md. App. 340, 397 A.2d 233 (1979); *Hoy* v. *Willis*, 165 N.J. Super. 265, 398 A.2d 109 (1978); *In the Matter of Adoption of J.S.R.*, 374 A.2d 860, (D.C. App. 1977); *Bennett* v. *Jeffreys*, *supra*; *In re One Minor Child*, 254 A.2d 443 (Del. 1969). *See generally*, Note, *Psychological Parents* v. *Biological Parents: The Courts Response to New Directions in Child Custody Dispute Resolution*, 17 J. FAM. L. 545 (1978-1979).

Furthermore, because of the passage of time since the first order terminating parental rights, there is a strong possibility that the "warm, enduring, and important" family bonds that this Court has traditionally sought to protect, *Stanley* v. *Illinois*, 405 U.S. at 652, no longer exist between the children and Doe or Roe.[23] If the

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[23] At the 1976 hearing to determine whether parental rights should be terminated, a State social worker stated that "Roe never demonstrated a strong emotional attachment to her

situation is as it appears to be, then, as in *Quilloin* v. *Walcott*, 434 U.S. at 254-255, ". . . this is not a case in which the proposed adoption would place the child with a new set of parents with whom the child has never before lived. Rather, the result of the adoption in this case is to give full recognition to a family unit already in existence, a result desired by all concerned, except the appellant. Whatever might be required in other situations, we cannot say that the State was required to find anything more than that the adoption . . . was in the 'best interests of the child' ".

Therefore, if this Court holds that the Delaware statute is unconstitutional or was applied unconstitutionally, the countervailing equitable and constitutional rights of these children will require the nonretroactive application of the Court's decision, if that is in their best interests.

B. If The Children Are Not Represented Before This Court, A Separate Evidentiary Hearing Will Be Necessary To Determine Whether The Children's Best Interests Require The Nonretroactive Application Of The Court's Decision.

Amici do not assert that longtime foster family placements create a presumption that the best interests of the children would be served by their remaining in foster care or being adopted by their longtime caretakers, although that is the position of some State laws, *e.g.*, MD. CHANCERY CODE ANN., Art. 16, § 75 (Supp. 1978), and some commentators. *E.g.*, BEFORE THE BEST IN-

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children." Another worker characterized Roe's relationship to her children as "detached". This second worker found that the only strong attachment was between Doe and Amy, and it was described as "unhealthy". *Appellee's Motion To Dismiss or Affirm* 6. On the other hand, a psychologist testified that he found a "good relationship" between the children and Doe and Roe. *Appellants' Brief* 10.

TERESTS OF THE CHILD, *supra* at 39 *et seq.* While the facts of the instant case, to the extent that they are known to *Amici*, suggest that vacating the termination order would be contrary to the children's best interests, without access to the full record and knowledge of the children's present situation, it is impossible to tell whether there are countervailing conditions which argue for the children's return to their biological parents. For example, in *Alsager* v. *District Court of Polk County*, 518 F.2d 1160, 1165 n.3 (8th Cir. 1975), even though all parties, including the parents, assumed that return of the children would not be in their best interests, on remand, it was revealed that the conditions of their foster placements had deteriorated to the point where their return to the parents appeared to be the most appropriate disposition. *Alsager* v. *District Court of Polk County*, 545 F.2d at 1166-1167; *see also*, *Alsager* v. *District Court of Polk County*, 406 F.Supp. at 23. *Compare Bennett* v. *Jeffreys*, *supra*, in which the New York Court of Appeals found that the children's best interests gave rise to an independent constitutional right to termination and adoption *with In the Matter of Sanjivini*, 47 N.Y.2d 374, 382, 418 N.Y.S.2d 334, 344, 391 N.E.2d 1316, 1321 (1979), in which the same court found that, through the 12 years of the child's foster placement, the mother's regular visits have preserved family ties, and, because the child had passed puberty, "she would likely take the transition in stride."

Without the children's participation, through a legal representative, in the proceeding before this Court, it is not possible to determine the strength of the parent/child bond between Doe and Roe and these five children; it is not possible to determine whether strong emotional and family ties have developed between the children and their pre-adoptive foster parents; and it is not possible to determine whether the most appropriate disposition would be to return the children to Doe or Roe, or to institute

promptly adoption proceedings.[24] Nevertheless, it is necessary to conclude that, under the particular facts of this case, there is a strong possibility that vacating the 1976 order terminating parental rights would not only be inconsistent with the children's best interests, but also deeply harmful to them.

Therefore, if the Delaware statute is held to be unconstitutional, and a sufficient inquiry into the children's best interests cannot be conducted by this Court, with the assistance of an appointed representative for the children, the case should be remanded to the Delaware courts for their determination as to whether this Court's decision should be given nonretroactive application, based on what would be in the best interests of each individual child—as determined by a subsequent evidentiary hearing. *See, e.g., Rothstein* v. *Lutheran Social Services of Wisconsin and Upper Michigan, supra; cf. Goldstein* v. *Lavine*, 100 Misc.2d 126, 418 N.Y.S.2d 845 (Sup.Ct., N.Y.Co. 1979) (Even though the foster parents were improperly decertified as foster parents, a subsequent hearing to determine the children's best interests was required before they could be returned to the foster parents.) At this hearing,[25] the Delaware courts should weigh considerations such as those suggested by the *Amicus Brief of the American Orthopsychiatric Association, et al.*, 38-44, with special attention being given to:

(1) The strength of the emotional tie that may remain between the children and their biological parents;

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[24] Of course, it is possible that counsel for the children will also be unable to reach such factual conclusions without a subsequent hearing, or, having made such a determination, counsel might not succeed in convincing this Court about the conclusion's correctness.

[25] At the hearing, the children should be represented by independent legal counsel. *See* Point I, *supra*.

(2) The strength of the emotional ties that may have developed between each of the children and their respective pre-adoptive foster parents;

(3) Any special needs of these children that make one disposition preferable to another; and

(4) The effect on the children of the different possible dispositions of the case.[26]

* * *

Anyone concerned about the rights of parents, and the family as a whole, to be free from unwarranted state intrusion may be justly uncomfortable with the proposition that the passage of time from the first assertion of parental rights to its final resolution (in their favor) may prevent a full vindication of those rights. *See, e.g., Matter of Suzanne Y.*, 92 Misc.2d 652, 662-663, 401 N.Y.S.2d 383, 389-390 (Fam. Ct., N.Y.C. 1977); Lowry, *Children's Rights*, found in: ADVOCATING FOR CHILDREN IN THE COURTS 359, 366 (1979). As one court asked:

> If a couple kidnapped an infant, and within that four years they became the psychological parents of the child and if both the parents and the kidnappers were equal in all respects would it be in the best interest of the child to continue custody with the kidnappers? *Hoy* v. *Willis*, 165 N.J. Super. at 270, 398 A.2d at 111 (quoting the lower court's letter opinion).

But this case is far from that extreme. Neither the State of Delaware nor the pre-adoptive foster parents have kidnapped these children. This case first came to the attention of the Delaware child welfare authorities because the parents themselves requested that the State assume custody of Amy and Bill. *Appellee's Motion To Dismiss or Affirm* 3. From the facts available, it ap-

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[26] These considerations parallel those that Delaware courts already use. *In re Three Minor Children*, 406 A.2d 14, 19 (Del. 1979); *see also*, 13 DEL. CODE ANN. § 772(a) (1978).

pears that Delaware authorities at first provided supportive services in an attempt to help Doe and Roe better care for their children. When the Delaware authorities judged that the initial situation had improved in 1973, they returned Amy and Bill to them. *Id.* at 4. Only later were the children involuntarily removed. In the years since then, Delaware authorities have had legal custody of the children because of an apparently unchallenged judicial determination of parental unfitness, *i.e.*, neglect and incest. After 1975, the parents apparently made no effort to maintain contact with the children, through either agency supervised visitation or written communication.[27]

Furthermore, *Amici* are not arguing that the parents do not have a right to have this Court consider their constitutional claims. First, it is possible that the return of the children to Doe and Roe will be in the children's best interests. Second, even if the children cannot be

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[27] During the long appeals process in this case, Doe and Roe apparently did not request a stay of the order terminating parental rights, which, if granted, would have preserved their visitation rights. *Cf. Appellants' Brief* 10 n.17. *Compare with Lemon* v. *Kurtzman*, 411 U.S. at 196-197, 204-205 (emphasizing that there had been no request for injunctive relief *pendente lite*). Moreover, Appellee claims that, before the order terminating parental rights, parental visitation was also minimal. According to Appellee: In 1973, Amy, Bill, and Charles were involuntarily removed from Doe's and Roe's custody because of the alleged sexual abuse of Amy. After the filing of a criminal complaint alleging the sexual abuse, Doe and Roe fled to Maryland. "During their four month absence from Delaware neither Doe nor Roe inquired about the welfare of their children." *Appellee's Motion to Dismiss or Affirm* 5. For one year after Doe's conviction for the lesser included crime of offensive touching and the crime of child neglect, the children were in foster care, and Doe and Roe made only one contact with them. *Id.* at 6.

returned to them, the parents have the right to have the stigma of the termination decision removed, if it was ordered improperly. *Cf. Brown* v. *Guy*, 476 F.Supp. at 773 (The "stigma" of a civil decree of child abuse or neglect "may be more traumatizing than a fine or imprisonment in a criminal proceeding.") Third, if there was some wrongdoing on the part of State officials, the parents conceivably have a valid claim for money damages under 42 U.S.C. § 1983 (1976). *See, e.g., Kyees* v. *County Department of Public Welfare, supra; Duchesne* v. *Sugarman*, 566 F.2d 817 (2d Cir. 1977); *Sherrad* v. *Owens, supra.*

On the other hand, to hold that these children cannot be protected from continued uncertainty and possibly serious trauma "would be to return to the child-as-chattel mentality." *Stapleton* v. *Dauphin County Child Welfare Services*, 228 Pa. Super at 392, 324 A.2d at 573. Children are not property to be returned to their "lawful owners" regardless of the emotional damage to them. Recognizing the right of these children to an outcome determined in light of their best interests will establish an important principle: foster children are not the "pawns" of the State—or their parents—"who may be whisked from family to family at the whim of state officials." *OFFER*, 431 U.S. at 860 (Stewart, J., concurring).

CONCLUSION

In view of the foregoing, the National Association of Counsel for Children and the Guardian Ad Litem Program of the District of Columbia urge this Court to give these five children party status in the proceeding before it and to appoint a legal representative for them to assure that the issues concerning their best interests are adequately presented to this Court. If such a representative is not appointed, *Amici* further urge that, if this Court holds that the Delaware statute is unconstitu-

tional or was applied unconstitutionally, this Court authorize the Delaware courts to decide whether its decision should be given nonretroactive effect, based on the findings of a subsequent evidentiary hearing to determine the disposition that would be in each child's best interests.

Respectfully submitted,

DOUGLAS J. BESHAROV
ROBERT M. HOROWITZ
JEAN R. BOWER
HARVEY SCHWEITZER
Volunteer Attorneys Office
District of Columbia
Superior Court
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 727-9707

Attorneys For Amici Curiae *

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* Counsel gratefully acknowledge the assistance of Barry A. Cooper and Neil L. Levine in the preparation of this brief.

APPENDIX

STATE OF DELAWARE
DEPARTMENT OF JUSTICE
Civil Division
Twelfth and Market Streets
P. O. Box 1708
Wilmington, Delaware 19899

RICHARD R. WIER, JR.
ATTORNEY GENERAL

MAY
24TH
1977

Ms. Judie Drexler
Department of Health and
Social Services
Delaware State Hospital
Administration Building
New Castle, Delaware 19720

Dear Ms. Drexler:

The purpose of this letter is to certify that in the State of Delaware, in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, or its equivalent, is appointed to represent the interest of the child in such proceeding.

In every criminal action alleging either abuse or neglect of a child, the Assistant Attorney General assigned to prosecute such a case does in fact represent the interest of the alleged child victim during the entire course of the judicial proceeding.

In all civil actions involving either abuse or neglect of children, a social worker from Child Protective Services of the Division of Social Services, is appointed by the court to act as guardian ad litem for the alleged abused or neglected child. Chief Judge Thompson of the Family Court of the State of Delaware has assured this Office that in all such cases, this appointment procedure is followed by the Court. It should further be noted that the Division of Social Services, as an agency of the State of Delaware, is represented in all legal matters by a full-time Deputy or Assistant Attorney General.

It is the opinion of this Office that the above-stated procedures comply with the provisions set forth under the Child Abuse Prevention and Treatment Act (P.L. 93-247, as amended).

If you need any further information or if this Office can be of further assistance, please do not hesitate to contact me.

Very truly yours,

Richard R. Wier, Jr.
Attorney General

RRW,Jr./dak